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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 324

HARRY M. AVANCE,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

May It Please The Court:

The petition of Harry M. Avance respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This action under the F. E. L. A. arose out of an accident wherein petitioner, a brakeman twenty-two years of age, sustained the loss of both legs when he was knocked from a brake platform and thrown under moving cars during a switching movement. The accident occurred on January 17th, 1942, at Bismarck, Missouri.

Upon the trial in December, 1942, in the Circuit Court of St. Clair County, Illinois, the jury returned a verdict in

favor of petitioner for $125,000.00 which, upon remittitur, was reduced to $100,000.00 and judgment entered for the latter amount (R. 9).[1] Upon appeal this judgment was sustained by the Appellate Court, Fourth District (R. 77). Thereafter the Supreme Court granted a petition for leave to appeal and, holding that petitioner had not proved interstate commerce as a matter of law, reversed the decision of the Circuit and Appellate Courts and remanded the entire cause for a new trial (R. 87).

The same court had previously held the 1939 amendment to the F. E. L. A. unconstitutional in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19. Pursuant to this policy the same court in the instant case not only ignored decisions of the United States Supreme Court directly in point but also refused to recognize and apply the 1939 amendment to the F. E. L. A.[2] which broadened the definition of interstate commerce by including within the coverage of the Act any employe "any part of whose duties as such employe shall be the furtherance * * * or shall in any way directly or closely and substantially * * *" affect interstate commerce. No question was raised in the Appellate or Supreme Court concerning the sufficiency of the evidence to establish the negligence of respondent.

OPINIONS OF THE COURTS BELOW

The opinion of the Appellate Court is reported in *Arance vs. Thompson*, 320 Ill. App. 406, 51 N. E. (2d) 334, and of the Supreme Court in ___ Ill. ___, 55 N. E. (2d) 57. The opinion of the Appellate Court is not contained in the record but that of the Supreme Court will be found commencing at page 81.

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[1] "R." refers to Transcript of Record.

[2] The text of the F. E. L. A. as amended in 1939 will be found set forth in extenso in the Appendix, page 29.

STATEMENT OF CASE

Prior to trial petitioner moved the court for its order requiring respondent to produce "all" records relating to interstate commerce and showing the origin and destination of cars in the train, those switched previous to the accident, and those delivered to the Missouri-Illinois Railroad Company (R. 4, 5). The court allowed this motion (R. 9). Instead of producing such records the respondent filed under oath certain admissions which are verbatim, as follows (R. 28, 29):

"1. As to request No. 1, this defendant admits that one or more cars in the train of engine 1209, which was being operated between Bismarck, Missouri, and Poplar Bluff, Missouri, on January 17, 1942, contained cars and shipments consigned in interstate commerce, and that said train also contained shipments which were solely in intrastate commerce.

"2. This defendant admits that engine No. 1209 did, on the 17th day of January, 1942, prior to the time it departed with a train from Bismarck, Missouri, switch one or more cars which were consigned in interstate commerce and one or more cars which were consigned in intrastate commerce.

"3. This defendant admits that the crew of which plaintiff was a member, on January 17, 1942, either at Bismarck, Missouri, or between Bismarck and Poplar Bluff, Missouri, did at diverse intervals haul, move, switch and transport one or more cars consigned in interstate commerce and one or more cars consigned in intrastate commerce.

"4. Answering request No. 4, this defendant admits that the crew of which plaintiff was a member did, at diverse intervals, on January 17, 1942, deliver one or more cars to the Missouri-Illinois Railroad Company consigned in interstate

commerce, and one or more cars consigned in intrastate commerce.

"5. Answering request No. 5, this defendant admits that firms, persons or corporations had ordered the delivery of one or more cars from without the State of Missouri, and one or more cars from wholly within the State of Missouri, which cars were at one time or another handled by the crew of which plaintiff was a member prior to the time the train departed from Bismarck, Missouri" (R. 28, 29).

Relying upon these sworn admissions the trial court struck out that portion of respondent's answer setting up the Workmen's Compensation Act of Missouri (R. 10). The trial judge thus ruled upon the pleadings, the motion and the sworn admissions that the case was governed by the F. E. L. A. as a matter of law (R. 10). Confirmatory of the court's order petitioner offered in evidence oral testimony and such documents as he could obtain from respondent to establish that at the time of the accident his crew was making up an interstate train, the engine was hauling an interstate car, and the employes were completing an interstate movement. It appeared also without dispute that petitioner's duties as a brakeman in freight and passenger service took him on various runs from Missouri, where he lived and worked off the board, to Dupo, Illinois, Memphis, Tennessee, and Little Rock, Arkansas (R. 12). There was no dispute or conflict in the evidence, which will be detailed in the brief.

The trial court instructed the jury that the rights and liabilities of the parties were governed by the F. E. L. A. (R. 54). Neither party requested that the issue be submitted to the jury (R. 53-62).

The Appellate Court in its opinion set forth verbatim the 1939 amendment and cited the authorities construing it, holding that the F. E. L. A. had been broadened with reference to interstate commerce and stating expressly there was no sub-

stantial controversy on this issue.

The Supreme Court made no reference to the provisions of the 1939 amendment, ignored completely the authorities construing it and in direct conflict with the decisions of this and other federal courts of authority held that both lower courts were in error in deciding that petitioner was entitled to the protection of the F. E. L. A. as a matter of law. The Supreme Court concealed vital and determinative facts not in dispute and misrepresented the contents of the record, particularly the sworn admissions of respondent, with reference to the only *bona fide* issue in the case.

JURISDICTION OF THE COURT

All the courts below found that the rights and liabilities of the parties were to be determined by federal statutes. The judgment of the Supreme Court sought to be reviewed was entered on May 16th, 1944 (R. 87). The action arises under the F. E. L. A. and the jurisdiction of this Court is invoked under Section 237-b of the Judicial Code, as amended by the Act of February 13th, 1925. Cases which sustain jurisdiction of actions under the F. E. L. A. are *Great Northern R. Co. vs. Leonidas*, 305 U. S. 1, and *Chicago, etc., R. Co. vs Devine*, 239 U. S. 52. That a federal question of substance is involved is clear. *St. Louis, S. F. & T. R. Co. vs. Seale*, 229 U. S 156; *Toledo, St. L. & W. R. Co. vs. Slavin*, 236 U. S. 454; *Southern Ry. Co. vs. Crockett*, 237 U. S. 725, and *Norfolk & S. R. Co. vs. Ferebee*, 238 U. S. 269. In the latter case it was said:

> "A substantive right or defense arising under the F. E. L. A. cannot be lessened or destroyed by a local rule of practice."

No case has been found where certiorari has been denied in like circumstances. The Supreme Court of Illinois previously held the 1939 amendment unconstitutional. Con-

fronted with a fact situation making it directly applicable if valid and confronted with the uniform current of authority in opposition to its views, the court so far abandoned its judicial station as to conceal vital facts and to misrepresent the sworn admissions and undisputed evidence in order to defeat the operation of the unpalatable statute. The opinion must not be relied upon because as said in *Norris vs. Alabama*, 298 U. S. 587:

> "Where a federal right is specially claimed in a state court, the United States Supreme Court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, the evidence must be examined."

Under the special circumstances of this particular case the opinion and judgment of the Supreme Court should be regarded as final for purposes of certiorari. Tested by its effect upon the rights adjudicated, it is final in every sense of the word. In the original order it is described by the court which rendered it as its "final order" in the cause, although this closing paragraph was deleted by the clerk in condensing the record (R. 87). It is not subject to change, review or re-examination in any subsequent proceeding. Under the doctrine of law of the case and its strict application in Illinois it is final and conclusive now and forever on petitioner's right to a determination as a matter of law that he comes under the F. E. L. A. As said in *Commissioners, etc., vs. Schmidt*, 379 Ill. 130, 39 N. E. (2d) 1012:

> "Where a case has been decided upon appeal by this court and is brought up upon a second appeal involving the same questions, the only question open for consideration is whether the trial court followed the mandate of this court."

The opinion and judgment herein further preclude petitioner from contending in any court except this one that he is entitled to the protection of the F. E. L. A. as a matter of

law. In Illinois questions decided on a previous appeal will not again be considered by the court on a second appeal. In that state this doctrine is so thoroughly established as to admit of no further doubt: *Norton vs. Moshier*, 114 Ill. 146, 28 N. E. 463; *Smyth vs. Neff*, 123 Ill. 310, 17 N. E. 702; *West vs. Douglas*, 145 Ill. 164, 34 N. E. 141; *Dempster vs. People*, 183 Ill. 321, 55 N. E. 713; *Union Nat'l Bank vs. Post*, 192 Ill. 385, 61 N. E. 507; *Penn. Plate Glass Co. vs. Rice Co.*, 216 Ill. 267, 75 N. E. 246; *People vs. Drainage Comm.*, 282 Ill. 514, 118 N. E. 742; *People vs. Keokuk, etc., Co.*, 295 Ill. 176, 129 N. E. 87; writ of error dismissed, 258 U. S. 613; *Stevenson vs. Stevenson*, 297 Ill. 338, 130 N. E. 771; *City of Chicago vs. Callin*, 316 Ill. 104, 146 N. E. 741; *Somonauk Bank vs. Hagen*, 286 Ill. App. 621, 3 N. E. (2d) 892; *Underground Const. Co. vs. Sanitary Dist.*, 289 Ill. App. 609, 6 N. E. (2d) 696; *Vick vs. Ill. Bankers Life*, 292 Ill. App. 341, 11 N. E. (2d) 46; *Country Club, etc., Co. vs. Gillham's Estate*, 294 Ill. App. 184, 13 N. E. (2d) 631; *Knowles, etc., Co. vs. Nat. Plate Glass Co.*, 301 Ill. App. 128, 21 N. E. (2d) 913; *Review, etc., Co. vs. McCoy*, 303 Ill. App. 444, 25 N. E. (2d) 549; *Ritter vs. Ritter*, 313 Ill. App. 407, 40 N. E. (2d) 565; *Duncan, etc., Corp. vs. Parking, etc., Corp.*, 321 Ill. App. 299, 53 N. E. (2d) 9.

The opinion and judgment are final on all federal questions which were or could have been presented. *Bonner vs. Gorman*, 213 U. S. 89; *Yazoo, etc., R. Co. vs. Adams*, 180 U. S. 1.

Originally this Court held that only the face of the judgment could be considered in determining finality. *Hazeltine vs. Bank*, 183 U. S. 130. This rule was abandoned in *Clark vs. Williard*, 292 U. S. 112, in favor of the more liberal doctrine that the opinion should be considered in determining the nature and scope of the order or judgment entered. This shift of position is more in line with the doctrine of *Ex parte Tiffany*, 252 U. S. 32, that for purposes of appellate jurisdiction a final judgment and decree is the same thing as a final

decision. Recently under more liberal interpretation it has been held that finality must be determined in accordance with substance and not merely by form, this Court stating in *The Department, etc., vs. Pink*, 317 U. S. 264:

> "For the purpose of the finality which is prerequisite to a review in this court, the test is not whether under local rules of practice the judgment is denominated final * * * but rather that the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court."

Historically the appellate jurisdiction of this Court was conferred to guarantee the paramount authority and supremacy of federal law. Its major, if not sole, purpose was to effectuate the mandate that the Constitution and the acts of Congress and treaties should be the supreme law of the land.

While it may well have been the intention of the Judicial Code to restrict the obligatory appellate jurisdiction to a narrow class of cases, yet without defeating the constitutional and legislative purpose this cannot be true of its discretionary jurisdiction. As applied to the case at bar no prohibition appears in the Judicial Code itself. To self-impose one by making a fetish of finality, which this Court has recently declared should be determined by substance and not form, from the effect upon ultimate rights and not procedural attributes, would be most unwise. When under Illinois law the decision, in truth and fact, is final and so considered by the court which rendered it, petitioner should not be relegated to years of relitigation, prohibitive from the standpoint of expense and delay, before an opportunity of review in this Court. This would be a sorry remedy, indeed.

No conception of finality should be entertained which would thus permit the state courts to circumscribe at will the discretionary jurisdiction of the Supreme Court of the

United States contrary to the rule of *Powell vs. Supervisors, etc.*, 150 U. S. 433. The rigid concept of finality originally adopted as a labor saving device has resulted in useless delays and great expense for litigants, courts and counsel. See Thurman Arnold, 41 *Yale Law Journal*, page 539.

The purpose of the finality rule and the interests of judicial integrity can be served only by an inquiry into the record to ascertain whether it be true or false that the Supreme Court has misrepresented the facts to defeat the operation of a federal statute. If the claim be true, then by reversal and reinstatement of the judgment the litigation is ended. A decision on the validity, effect and application of the 1939 amendment will save the bench and bar of the nation, the carriers and their injured employes, a great deal of expense, uncertainty and needless litigation which is bound to follow decisions like the one here under review.

It would be a perverse application of a labor saving device for this Court to sit idly by and permit years of relitigation under an erroneous decision with the ultimate object of assuming jurisdiction at its close, cancelling what has been done, laying down correct standards and then starting the process all over again. And this, especially, where there is a conflict on constitutional and federal questions between the Supreme Court and the Appellate Court of the particular state and in the same case!

It is now definitely settled that the court will consider the opinion as an aid in construing the order. *Great Lakes Dredge & Dock Co. vs. Huffman*, 319 U. S. 293; *Metropolitan Water Co. vs. Kaw, etc.*, 223 U. S. 519. Consideration of the effect upon "the ultimate right" is now definitely required by *The Department, etc., vs. Pink*, 317 U. S. 264.

It is respectfully submitted that the full extent of this Court's power should be made available to petitioner by certiorari.

THE QUESTION PRESENTED

The issues of negligence, contributory negligence and damages were submitted to the jury (R. 53-62). The Appellate Court thoroughly considered the issues of damages and approved the decision of the trial court with respect to both interstate commerce and damages. In Illinois the decision of the Appellate Court in a personal injury case is final with respect to damages and the Supreme Court has no power to consider that question, as held in *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372; *Smith vs. C. P. & St. L. Ry. Co.*, 236 Ill. 369, 86 N. E. 150; *McCulloch vs. Illinois Steel Co.*, 243 Ill. 464, 90 N. E. 664; *Sheridan vs. Peoria Ry. Co.*, 241 Ill. 469, 89 N. E. 798.

In the Supreme Court the only *bona fide* issue was that of interstate commerce. As evidenced by the opinion (R. 81) nothing else was deemed of sufficient importance to merit attention except an admonition that an explanatory instruction should hereafter be given to juries with reference to mortality tables. While the court did state that its decision on interstate commerce rendered unnecessary a consideration of other instructions, it is noteworthy that immediately following this remark the court, in view of a new trial, indicated its opinion with reference to a proper instruction on life expectancy, adding that it was only done "for the benefit of the parties" and that they would not have reversed the case "because of this evidence alone." Resorting to the opinion as an aid in construing the judgment it is clear that the sole and the isolated issue in the Supreme Court was:

> Did the evidence warrant the lower courts in holding as a matter of law that petitioner was entitled to the protection of the F. E. L. A.?

It is this sole issue with its related question of constitutionality, effect and application of the 1939 amendment that we now seek to have resolved by this Court.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Supreme Court of Illinois erroneously failed to recognize the validity, authority and effect of the 1939 amendment to the F. E. L. A. and erroneously decided a federal question of substance in conflict with the decisions of this Court, the Circuit Courts of Appeal, and the courts of last resort of various states, to-wit:

A. In that in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19, wherein the 1939 amendment was directly held unconstitutional it inaugurated a policy culminating in the decision below, which refuses to recognize the validity and application of the amendment but renders the same void and nugatory, in direct conflict with the decision of this Court in *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473.

B. In that the opinion and decision below purposely ignored and refused to follow the paramount authority of *Philadelphia & R. Co. vs. Hancock*, 253 U. S. 284, which is directly in point on the determinative feature.

C. In that by refusing to apply the 1939 amendment to undisputed facts requiring its application, the court in the opinion and judgment below impliedly held the amendment to be unconstitutional (it was expressly so held in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19) in direct conflict with various appellate tribunals in the following states:

New York:

Wright vs. New York Central R. Co., 263 App. Div. 461, 33 N. Y. S. (2d) 531.

Pennsylvania:

Scarborough vs. Pennsylvania R. Co., 154 Pa. Super. 124, 35 Atl. (2d) 603.

Indiana:

Prader vs. Pennsylvania R. Co., 113 Ind. App. 518, 49 N. E. (2d) 387.

Kansas:

Piggue vs. Baldwin, 154 Kan. 708, 121 Pac. (2d) 183.

Williams vs. Chicago, R. I. & P. R. Co., 155 Kan. 813, 130 Pac. (2d) 596.

Skanks vs. Union Pacific R. Co., 155 Kan. 584, 127 Pac. (2d) 431.

New Jersey:

McFadden vs. Pennsylvania R. Co., 130 N. J. L. 601, 34 Atl. (2d) 221.

California:

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 271, 120 Pac. (2d) 880.

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Lewis vs. Industrial Commission, 19 Cal. (2d) 284, 120 Pac. (2d) 886.

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Arkansas:

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Tennessee:

Louisville & N. R. Co. vs. Potts, 178 Tenn. 425, 158 S. W. (2d) 729.

Iowa:

McCall vs. Pitcairn, 232 Iowa 867, 6 N. W. (2d) 415.

Wisconsin:

Great Northern R. Co. vs. Industrial Comm., 245 Wis. 375, 14 N. W. (2d) 152.

D. In that the decision below is in direct conflict with that of the Seventh Circuit Court of Appeals (in which circuit Illinois is located) in the case of *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366, and of other federal courts in such cases as *Ermin vs. Pennsylvania R. Co.*, 36 F. Supp. 936, and *Agostino vs. Pennsylvania R. Co.*, 50 F. Supp. 726.

E. In that irrespective of the constitutionality, effect and application of the 1939 amendment, and considered solely from the standpoint of the scope of the F. E. L. A. before its passage, the opinion and decision below is in direct conflict with the uniform current of authority in both state and federal courts, and contrary to *Philadelphia & R. Co. vs. Hancock*, 253 U. S. 284; *Reading Co. vs. Larkin*, 114 F. (2d) 416; *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117; *Sullivan vs. Wabash R. Co.*, 23 F. (2d) 323; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Davis vs. Dowling*, 284 F. 670; *Pipal vs. Grand Trunk Western R. Co.*, 341 Ill. 320, 173 N. E. 372; *Herb vs. Pitcairn*, 306 Ill. App. 583, 29 N. E. (2d) 543; *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965; *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 185 N. E. 244, 352 Ill. 195.

F. In holding that the question of interstate commerce should have been submitted to the jury in direct conflict with the uniform current of authority in both state and federal court which holds that where the facts are undisputed the question of interstate commerce is one of law for the court and not one of fact for the jury. (Authorities under E, *supra*.)

It is essential that a writ be granted in order to determine

important questions relating to the validity, construction and interpretation of the 1939 amendment to the F. E. L. A. and, specifically, to determine whether the Illinois Supreme Court shall be permitted to continue its policy of frustrating the operation of a federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court and other federal courts construing it.

PRAYER

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding said court to certify and send to this Court a transcript of the record in the case entitled "*Harry M. Avance, Plaintiff-Appellee, vs. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant,* No. 27864," including also the proceedings in said Supreme Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court be reversed and that the judgment of the Circuit Court of St. Clair County and of the Appellate Court, Fourth District, be reinstated herein.

HARRY M. AVANCE, *Petitioner.*
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